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No.

In the Supreme Court of the United States

CANDELARIO HOLGUIN, JR.,
Petitioner,

V.

THE STATE OF TEXAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF APPEALS
FOR THE EIGHTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether a prosecutor, who has been placed on notice by a specific request, can avoid disclosure of a benefit extended the prosecution's key identity witness in a case with a contested alibi defense, so as to prevent cross-examination on that benefit before the trier of fact, by delegating the offer of the benefit to a different prosecutor, without violating the Petitioner's right to Due Process of Law as guaranteed by the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

The parties to the proceedings below and in this Court are Petitioner, Candelario Holguin, Jr.; Herbert Ochoa; and Julio Ventura and Respondent, The State of Texas.

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The Petitioner, CANDELARIO HOLGUIN, JR., respectfully prays that a Writ of Certiorari issue to review the Judgments of the Texas Court of Appeals for the Eighth District in this case, dated February 15, 2001, and the failure of the Texas Court of Criminal Appeals to review that Judgment on Petition for Discretionary Review dated September 12, 2001.

OPINION BELOW

The opinion of the Texas Court of Appeals for the Eighth District in each of three (3) indictments tried in one (1) jury trial are identical and are not to be reported, but the portion pertinent to the issue presented herein is attached hereto as Appendix A. The judgment is attached hereto as Appendix B. The denial of Petitioner's Motion for Rehearing is attached hereto as Appendix C. The denial of

Petitioner's Petition for Discretionary Review to the Texas Court of Criminal Appeals is attached hereto as Appendix D.

JURISDICTION

The final judgment of the Texas Court of Criminal Appeals denying Petitioner's Petition for Discretionary Review was entered on September 12, 2001. The jurisdiction of this Court is invoked pursuant to **28 U.S.C.A. sec. 1257(a)(1993).**

STATUTES AND RULES INVOLVED

United States Constitution, Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

The State of Texas, pursuant to an indictments numbered F-98-02888-KH; F-98-02889-KH; F-98-02890-KH, instituted proceedings against the Petitioner in the Criminal District Court of Dallas County, Texas, for the

offense of engaging in organized criminal activity. The Petitioner was tried on his plea of not guilty to a jury on January 11-28, 1999. The jury found the Petitioner guilty in each case of the offense of engaging in organized criminal activity and assessed punishment at forty-five (45) years confinement in the Institutional Division of the Texas Department of Criminal Justice and a fine of $10,000.00 plus costs of court in each case. Notice of appeal, pursuant to **Rule 25.2, Tex. R. App. Proc.** was timely given.

On February 15, 2001, in an unpublished opinion, the Texas Court of Appeals for the Eighth District at El Paso affirmed the judgments of conviction. (See Appendix "A"). A Motion for Rehearing was filed, and denied by written order dated March 28, 2001.(See Appendix "C"). On September 12, 2001, the Texas Court of Criminal Appeals denied Petitioner's Petition for Discretionary Review. (See Appendix "D").

REASONS FOR THE ALLOWANCE OF THE WRIT

1.

Pursuant to U.S. Sup. Ct. Rule 10, the Petitioner contends that review on Writ of Certiorari is warranted. The trial court should have granted a new trial because the prosecutor in Petitioner's case offered a benefit to the State's witness Verdeja and did not disclose that benefit to the defense although such disclosure was timely requested, and such benefit would have reflected a bias on the part of the witness. The decision on appeal was in conflict with the decision of other United States Courts of Appeals and this

Court. Further, Petitioner believes that the decision of the Texas Court of Appeals on direct appeal of his conviction decided an important question of federal law that has not been, but should be, settled by this Court.

11.

The panel opinion of the Texas Court of Appeals for the Eighth District held that Petitioner's points of error, complaining of the failure of the Prosecution to disclose to the Petitioner, upon timely request, the existence of a benefit conferred on a key witness for the State was not error because the court found that the witness' "did not ask for consideration and was, in fact, unaware that any telephone calls had been made" to obtain a benefit for him. Further, the court held that, due to the witness' lack of knowledge of the benefit, the evidence would not have been relevant and inadmissible to impeach him.

In reaching it's decision, the court noted that the "resolution of the creditability of the witnesses who testified at the Motion for New Trial Hearing is critical to the issue"...now before the court. Further, the opinion noted that "there is substantial proof in the record that the Dallas County prosecutor did not ask for any consideration for Verdeja in order to obtain his testimony..." However, Johnnie Cleveland, an Assistant District Attorney with Denton County assigned to the family violence section, was the prosecutor on Mr. Verdeja's probation revocation motion in Denton County, Texas. Ms. Cleveland testified that she advised the court in Denton County that the low recommendation to resolve the Motion to Revoke

Probation against Mr. Verdeja was partially based on making it so that he would be available to testify in Petitioner's case. The witness Paul Roman Verdeja, III, testified that he remembered the exchange between the Judge in Denton County and Ms. Cleveland regarding the leniency of the sentence.

This evidence alone, demonstrates the Texas Court of Appeals' misinterpretation of the facts on which it based it's opinion overruling Petitioner's points of error. The evidence is material because the witness admits to hearing the conversation where the leniency of the sentence recommended by the Dallas County District Attorney's Office was discussed. This is where the panel opinion of the court misdirects the focus of "witness credibility." The determination of the credibility of witnesses is for the fact finder at trial, i.e. the jury.

The withholding of evidence that a lead prosecutor in a Defendant's case contacted the District Attorney's Office of another county on behalf of the witness, especially when the witness is the only witness that identified the Petitioner at the scene of the offense, deprives the Petitioner of the opportunity to fully cross-examine that witness as to any motive or bias for his testimony. **Delaware v. Van Arsdall, 475 U.S. 673 (1986).** The state court's holding allows prosecutors to carefully structure benefits for witnesses so as to prevent the use of the benefit as a possible bias or motive at trial. Such a decision sets dangerous precedent as to the fairness of future trials in this State.

(A) Standard of Review.

Under **United States v. Bagley, 473 U.S. 667 (1985),** four aspects of materiality for **Brady v. Maryland, 373 U.S. 83 (1963)** purposes bear emphasis. First, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Thus, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. **473 U.S., at 682. United States v. Agurs, 427 U.S. 97, 112-113 (1976).** Second, **Bagley** materiality is not a sufficiency of evidence test. One does not show a **Brady** violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken -to put the whole case in such a different light as to undermine confidence in the verdict. Third, once a reviewing court applying **Bagley** has found constitutional error, there is no need for further harmless-error review, since the constitutional standard for materiality under **Bagley** imposes a higher burden than the harmless-error standard of **Brecht v. Abrahamson, 507 U.S. 619 (1993).** Fourth, the state's disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item-by-item. **473 U.S., at 675.**

(B) Factual Background.

Petitioner was charged by three indictments alleging

engaging in organized criminal activity. All three indictments tried together in a single trial. The indictments are identical, all alleging a predicate offense of an aggravated assault that occurred on the early morning hours of May 30, 1998. The indictments arose out of a single altercation, the only difference being in each indictment there was identified a different victim. In Trial Court Cause No. F98-02888-KH, the victim identified was Paul Verdeja. Paul Ramon Verdeja, III was the only victim to testify at Petitioner's trial. Verdeja is the only eye witness that placed Petitioner at the scene of the offense. Verdeja identified Petitioner in a photographic line-up. On cross-examination Verdeja admitted to the amount of alcohol he had consumed.

Petitioner, through a number of witnesses, presented an alibi defense that Petitioner was in College Station, Texas where he resided at the time of the assault.

After Petitioner was convicted, trial counsel filed a verified motion for new trial pursuant to Rule 21, Tex. R. App. Proc., alleging that the prosecution had withheld information concerning a benefit that had been extended the witness Verdeja (See Appendix E).

Kimberly McCrary testified that she was an attorney appointed by a Denton County Criminal Judge to represent Paul Verdeja, III in September 1998 on a motion to revoke Verdeja's one year family violence probation. As this was a motion to revoke probation, and generally a no-bond situation, the witness filed an application to set Verdeja's bond. She had a telephone conversation with Investigator Joe

Seaton, primary investigator for the State in Petitioner's case, who stated he was willing to testify for Verdeja on the bond. On October 2, 1998, she found out that the case was going to be resolved even though at the time it was set for a contested probation revocation hearing. No offer had been made that was acceptable to Verdeja when the case was set for a contested revocation hearing, but she received an offer from the District Attorney's office to allow Verdeja to plead to his back-time that was less than one month. The witness testified it was a good recommendation, and *was based upon the fact that Verdeja had recently been the victim of an assault, had been in the hospital, and had not been able to complete the conditions of probation.*

The judge, when he took the plea on the motion to revoke probation, was surprised by the offer of the District Attorney's office. On cross-examination she said that nothing during the course of her representation had been said about Verdeja's testimony in Petitioner's case, and her client never asked her to obtain leniency in the Denton County case for testimony in Petitioner's case and Investigator Seaton's offer to testify on Verdeja's behalf in the Denton County case was not in exchange for any deal in Petitioner's case. On redirect, the witness stated that Verdeja was originally placed on probation in November 18, 1996, the assault that was the subject of Petitioner's case took place on May 30, 1998, and the State's position would be that Verdeja's hospitalization wasn't a great excuse to fulfill the conditions of probation as Verdeja had already been on probation at the time of the assault for over a year and a half.

Jonnie Cleveland testified that she was a family violence prosecutor in the Denton County District Attorney's office on September 10, 1998, and that Paul Verdeja was on probation for a family violence assault case and there was a pending motion to revoke his probation filed. She identified the order revoking Verdeja's probation and reflecting a sentence reduction on the revocation of 25 days time served, *which was unusual as the normal largest sentence reduction normally agreed to and granted in that Court was about one-half the original sentence, or 180 days.* Kerry Piel, her supervisor, advised her that the District Attorney's office was going to recommend 25 days. The Trial Court did not care for the recommendation and asked the witness why the District Attorney's office was recommending such a low recommendation. She advised that *the basis for the 25 day recommendation was the fact that Verdeja was the victim of a worse case, and so Verdeja would be available to testify in Petitioner's case.*

Kerry Piel testified he dealt with the motion to revoke probation on Verdeja when he received a telephone call from whom he believed to be an investigator with the Dallas District Attorney's office, who advised him that Verdeja was a witness in a major felony in their county and had been injured quite severely in an assaultive type crime. The Dallas District Attorney's office wanted to know if the witness could look into the motion to revoke and see if there was anything that the witness could do, make an evaluation, or maybe get a bond or something to get Verdeja out of jail so Verdeja could keep his job and keep working. The witness interpreted it is a request for consideration. Verdeja was in custody on the motion to revoke, and

Mr. Piel ultimately conveyed to Ms. Cleveland a recommendation to offer Verdeja 25 days for back time on his revocation motion. Based upon the witness's experience in the family violence section of the Denton County District Attorney's office, on a one year probation it would not be normal to offer 25 days or time served on a revocation, but normally, on a revocation, if there was a new violation half the amount of time on probation would be as low as a recommendation would go, or if it was just technicals or failing to comply with routine probation conditions, the office might go as low as a quarter. A quarter in this case would be 90 days and the *witness stated it would be fair to say that the consideration that was given him was based upon his status as a victim of a crime in Dallas County.* On cross-examination it was never discussed to give leniency to Verdeja in exchange for his testimony in Petitioner's aggravated assault case. On redirect the witness stated that the decision to offer the time served was based, at least in part, on the telephone call received from the Dallas County District Attorney's office.

The prosecution stipulated that the information concerning the contact from the Dallas County District Attorney's office to the Denton County District Attorney's office was not made available to the defense at the time of trial. Paul Ramos Verdeja was called by the State in opposition to Petitioner's motion for new trial, and stated that he did not request his attorney on the Denton County motion to revoke to seek out the Dallas District Attorney's office or the Irving Police Department to intervene in the revocation on his behalf. He testified that his testimony at Petitioner's trial on January of 1999 was not influenced by what

happened to him on his Denton County motion to revoke. The witness testified that serving the least amount of time to get off probation was a benefit to him. The witness stated that Investigator Seaton, the officer in charge of the investigation of the assault case against Petitioner, would be willing to testify before the Court concerning bond and Verdeja's situation and inability to satisfy the terms of his probation. The witness remembered the judge questioning the Assistant District Attorney about the leniency of the sentence.

At this point in time, Howard Blackmon, prosecutor at Petitioner's trial, stated to the Court that he was the individual that called Kerry Piel. Mr. Blackmon testified that he talked to Kerry Piel in August or early September when he found out that Verdeja was in custody in Denton County.. He testified he had a brief conversation with Mr. Piel about a bond amount, had a further brief conversation regarding Petitioner's assault case and asked Mr. Piel to look into the case to see what Verdeja was facing in the case and whether or not he would be in jail. He never asked for consideration to be given to Mr. Verdeja, that Verdeja was a victim in the case and that he did not need to give any consideration to the victim. On cross-examination he admitted that he knew that Investigator Seaton had offered to go testify at the bond reduction hearing on behalf of Verdeja.

(C) Preservation of Error.

Petitioner, timely filed a motion for discovery that requested, among other items:

> ". . .I. Any and all considerations or promises of consideration given to or on behalf of a witness or expected or hoped for by the witness. By "consideration" defendant refers to absolutely anything, whether bargained for or not, which arguably could be of value or use to a witness or to persons of concern to the witness....
>
> M. The criminal record of Paul Verdeja, III ..."

Petitioner timely filed a motion for the production and inspection of evidence and information which may lead to evidence (CR, 033), which requested in part:

> " . . .5. The criminal record of any witness called by the State, including indictments, convictions or acquittals, or charges now pending against any State witness. This information is required by the defense to determine whether there exists bias or prejudice on the part of the State's witness and to impeach the credibility of said witness if any of them have been convicted of a felony or misdemeanor involving moral turpitude ... "

Howard Blackmon, stated on the record that there were no agreements regarding any incentives offered for any of the State's witness's testimony. In a hearing on the codefendant's motions, which were identical to Petitioner's, the Court reminded the prosecutor that such request was subject to **Brady v. Maryland, 373 U.S. 83 (1963)** and

ordered the prosecutor to produce such. In ruling on paragraph I of the motion, any and all considerations or promises of consideration, the prosecutor, Mr. Blackmon, replied that there were none. The Court granted the discovery of criminal records as to Verdeja and added that if *there was anything that the defense would need in order to prepare their defense or might mitigate or anything, Blackmon needed to turn that over.*

At the start of trial, the prosecutor, Howard Blackmon, once again reiterated that there were no deals for any testimony. At the end of the State's case, the defense attorneys once again re-urged their **Brady v. Maryland, 373 U.S. 83 (1963)** motion, and the State once again affirmatively on the record stated that there was no material that would fall under that category.

After Petitioner's conviction, Petitioner filed a verified motion for new trial pointing out specifically to the Court that the prosecution had withheld evidence concerning considerations offered to the witness Verdeja (See Appendix E). The Trial Court entered a written order denying Petitioner's motion for new trial (See Appendix F).

(D) Argument.

The development of standards relating to prosecutorial suppression of evidence favorable to a defendant was set in **Kyles v. Whitley, 514 U.S. 419 (1995):**

> The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against

misrepresentation and is of course most prominently associated with this Court's decision in **Brady v. Maryland 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).** *See id*, **at 86, 83 S.C., at 1196** (relying on **Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 341-342, 79 L.Ed. 791 (1935),** and **Pyle v. Kansas, 317 U.S. 213, 215-216, 63 S.Ct. 177, 178179, 87 L.Ed. 214 (1942).** **Brady** held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." **373 U.S., at 87, 83 S.Ct., at 1196-1197;** see **Moore v. Illinois 408 U.S. 786, 794-795, 92 S.Ct. 2562, 2567-2568, 33 L.Ed.2d 706 (1972).** In ***United States v.* Agurs; 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976),** however, it became clear that a defendant's failure to request favorable evidence did not leave the Government free of all obligation. There, the Court distinguished three situations in which a **Brady** claim might arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, **427 U.S., at 103-104, 96 S.Ct., at 2397-2398;** second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence, *id.*, at **104-107, 96 S.C., at 2398-2399;** and third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way. The Court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial."

Id., at **108, 96 S.Ct., at 2400.**

> In the third prominent case on the way to current **Brady** law, ***United States v. Bagley*** **473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985),** the Court disavowed any difference between exculpatory and impeachment evidence for **Brady** purposes, and it abandoned the distinction between the second and third **Agurs** circumstances, i.e., the "specific-request" and "general- or no-request" situations. **Bagley** held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." **473 U.S., at 682.**

Texas has established a three-part test to determine when a prosecutor has violated the due process clause by failing to disclose evidence. Under Texas law, an accused must prove all three prongs of the test in order to establish a due process violation.

(1) **Has there been a failure to disclose evidence?** The individual prosecutor has a duty to learn of any favorable evidence known to others on the prosecution team and acting on the government's behalf in the case, including the police. **Kyles v. Whitley, 514 U.S. 419 (1995).**

(2) **Is the evidence favorable to the accused?** Favorable evidence includes both "exculpatory" and "impeachment" evidence. "Exculpatory evidence" is testimony or evidence which "tends to justify, excuse, or clear the defendant from alleged fault or guilt." "Impeachment

evidence" is that which is offered "to dispute, disparage, deny, or contradict." The test for favorability is whether the evidence, if disclosed and used effectively by defense counsel, *may* make the difference between conviction and an acquittal.

(3) **Does the evidence create a probability sufficient to undermine the confidence and the outcome of the proceeding, i.e., was the evidence "material?"** Evidence withheld by a prosecutor is "material" if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different. The standard is one of "a reasonable probability" of a different result. The issue is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence the defendant received a fair trial, which is understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability," therefore, is a probability sufficient to undermine confidence in the outcome of the trial. It is not a test for sufficiency of the evidence. Materiality is to be determined by examining the withheld evidence in the context of the entire record *and* the overall strength of the State's case.

In the instant case, Petitioner has met all three prongs of the test. The witness who received the benefit, Verdeja, was the only witness that linked Petitioner to the scene of the crime.

This is not an instance where Petitioner's presence at the scene of the offense went uncontested. Petitioner put on significant proof of an alibi defense.

It is ludicrous to the point of being a dangerous precedent to believe or hold that the prosecutor, Howard Blackmon, did not believe he was conferring a benefit to the witness Verdeja, that such benefit was relevant, and that should have been disclosed to the defense. A similar benefit had been bestowed upon State's witness Garcia, and that had been disclosed. **See United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993); Ouimette v. Moran, 942 F.2d 1 (1st Cir. 1991); United States v. LucLevasseur, 826 F.2d 158 (1st Cir. 1987).**

The Court of Appeals Opinion ignores the strong circumstantial evidence that a benefit was bestowed, and that the State's witness Verdeja knew he had received a benefit. To hold otherwise sets a dangerous precedent and sends a clear message to prosecutors that if you are careful with your inquiry, and don't affirmatively state that such inquiry is in exchange for the witness's testimony, then that is not a benefit that is required to be disclosed to the defense. Such flies in the face of common sense and fairness in trial proceedings.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Petition for Writ of Certiorari be, in all things, granted.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CANDELARIO HOLGUIN, JR.,	)	No. 08-99-00354-CR
Appellant,	)	08-99-00355-CR
	)	08-99-00356-CR
	)	Appeal from
	)	
V.	)	Criminal District
	)	Court No. 1
	)	
THE STATE OF TEXAS,	)	of Dallas County,
	)	Texas
Appellee.	)	(TC# F98-02888-KH)
	)	(TC# F98-02889-KH)
	)	(TC# F98-02890-KH)

OPINION

Candelario Holguin appeals his conviction for engaging in organized criminal activity. A jury found Appellant guilty and assessed his punishment at a fine of $10,000 and imprisonment for a term of forty-five years. We affirm.

FACTUAL SUMMARY

Terry Hughes and his wife, Pam Hughes, live in Irving, Texas. Appellant, who is a member of the Latin Kings street gang, lived in the house next door to the Hughes. Julio Ventura and Herbert Ochoa, who are also members of the Latin Kings and Appellant's co-defendants in this case, often spent time with Appellant at his home. An Irving police officer assigned to the gang unit characterized Appellant, Ventura, and Ochoa as "hardcore" members of the Latin Kings street gang due to their continuous involvement in gang activities. He additionally described Ventura as a "walking signboard for Latin King membership" and the leader of the Latin Kings.

Prior to the offenses at issue in this case, Terry Hughes had two confrontations with members of the Latin Kings. Approximately one month before the assaults, Ochoa's vehicle struck Terry's Cadillac as he backed into the street. Although both men were upset, Ochoa lost control and became hostile. Terry eventually filed a police report. On another date, Ventura approached the Hughes' teenage son, Brad Hughes, about procuring fifty pounds of marihuana for him for the price of $18,000. While Brad was initially interested in the drug deal and briefly discussed it with his older half-brother, James Hodges, he eventually declined to participate in it and informed Ventura of his decision. Ventura later approached Hodges again about the deal but he told Ventura they were not interested. Terry found out about Ventura's proposition and confronted him about it on May 29, 1998. At some point that same day, Ventura pulled his car into Terry's driveway and began

honking the horn. Ventura left after Terry threatened to call the police.

In the early morning hours of May 30 at approximately 3 a.m., Terry and two close friends, Rickey Coats and Paul Ramon Verdeja III, decided to drive Terry's Cadillac from Verdeja's apartment to Terry's home in order to pick up some music. Coats drove because he had not been drinking. Due to Terry's earlier dispute with Ventura, they had waited until quite late to return to Terry's home in an effort to avoid a confrontation with Ventura and the Latin Kings. Despite their efforts; they saw a large group of people, including members of the Latin Kings, gathered near some apartments close to Terry's home. As they passed, they heard something that sounded like a beer can or bottle strike the side of the vehicle so they stopped to determine whether the vehicle had been damaged. Terry got out of the car and began speaking to some of the individuals gathered there. Verdeja saw Terry fall suddenly to the ground as if he had been hit, so he got out to assist his friend. When Verdeja bent over to pick up Terry, someone struck him in the side of the head. Verdeja, holding onto Terry, attempted to get up and run to Terry's home but the mob of young men began beating and stomping both of them and eventually separated them. Verdeja tried repeatedly to get up and run to Terry's house for help but they beat him back to the ground each time. At one point, Verdeja's face was turned towards the Cadillac and he could see Coats on the street next to the car with a group of assailants kicking him in the head with their heels. Someone grabbed Verdeja by the hair and said, "This is what happens when you f—k with us. Don't f—k with the Latin Kings." He then told Verdeja that he was

going to kick him once more, and warned him to stay down or he would "end up dead like [his] white f ----- g friends." Verdeja positively identified Appellant and Ventura as being in the group who surrounded and struck both him and Terry. He specifically remembered exchanging blows with Appellant and he recalled Ventura kicking him in the mouth.

At approximately 3:30 a.m, Pam was awakened by her dog howling and crying so she got up to investigate. When she looked outside, she saw a large group of people gathered and what appeared to be a fight. She immediately called 911 and continued to watch the assault while reporting to the dispatcher what she saw. Pam saw Appellant's co-defendant, Ochoa, beating on someone in the driver's seat of a car in the street before pulling him out of the car and dropping him in the street. At that point, another individual joined in the attack and they began kicking and beating on the man in the street. She could also see a group of individuals apparently attacking another person. As she watched the assault by the car, Pam suddenly realized that the vehicle was their Cadillac. Pam stayed on the line with the dispatcher and continued to relay information about the assault. When finally permitted to go outside by the dispatcher, she found Verdeja crawling along the ground. She found Coats on the street near the Cadillac. Coats had an obvious head injury and was unconscious, covered in blood, and barely breathing. By this time, a police officer had arrived and assisted Pam in her search for Terry. By following a trail of blood, they found him a few houses down the street. Pam ini the severity of his injuries and the manner in

which his legs were twisted beneath his body. Ambulances soon arrived and took the three men to hospitals for treatment. As a result of the assault, both Terry and Coats suffered severe and permanent brain injuries as well as other injuries. Verdeja was also severely injured but he eventually recovered from most of his injuries. Consequently, only Verdeja could testify at trial.

In addition to Verdeja's testimony, other evidence connected Appellant to these offenses. Officers at the scene recovered a number of items in the street near the Cadillac, including a cell phone and pager. Subsequent investigation revealed that the pager belonged to Appellant and the cell phone was registered to his grandmother.

A Dallas County grand jury returned indictments against Appellant, Ochoa, and Ventura for engaging in organized criminal activity in connection with the aggravated assaults of Hughes, Coats, and Ventura and the nine cases were joined together for trial.[1] Appellant presented an alibi defense at trial and attempted to establish that he was in College Station several hours prior to the assault. The jury rejected this defense and found Appellant guilty. Appellant filed a motion for new trial alleging that the State had failed to reveal a benefit it provided to Paul Verdeja which could have been used to impeach his testimony. Following a hearing, the trial court denied the motion.

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[1] The indictment in the instant appeal alleged that Appellant, with the intent to establish, maintain, and participate in a combination with Ochoa, Ventura, and another co-defendant, or as a member of a criminal street gang, intentionally and knowingly committed the aggravated assault of Paul Verdeja. See TEX.PENAL CODE ANN. § 71.02(a)(1)(Vernon Supp. 2001).

NON-DISCLOSURE OF BENEFIT TO WITNESS

In two related points of error, Appellant complains of the State's failure to disclose impeachment evidence related to the complainant, Paul Verdeja. In Point of Error No. One, Appellant asserts that the trial court abused its discretion in denying his motion for new trial based upon the prosecutor's failure to disclose that Dallas County prosecutors influenced the Denton County District Attorney's Office to reduce the recommended sentence Verdeja would serve following revocation of probation in a family violence assault case. In Point of Error No. Two, he contends that he is entitled to a new trial because the non-disclosure of this evidence violated his right to due process as guaranteed by the Fourteenth Amendment and Article 1, Section 19 of the Texas Constitution.[2]

Prior to trial, Appellant requested that the State disclose any consideration or promises of consideration given to a witness. He also sought to discover impeachment evidence that would show a witness's bias or prejudice. At the pretrial hearings, the prosecutor, Howard Blackmon, represented that no deals had been made in the case.

At the motion for new trial hearing, Appellant presented evidence that on November 18, 1996, Paul Verdeja had entered a nolo contendere plea to the offense of family

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[2] Appellant has not provided separate analysis and authority related to his argument under the Texas Constitution. Insofar as his contentions are based on our state constitution, they are waived. *Dewberry v. State*, *4* S.W.3d 735, 748 (Tex.Crim.App. 1999); *Heitman v. State*, 815 S.W.2d 681, 690 n.23 (Tex.Crim.App. 1991).

violence. In accordance with the plea bargain, the court assessed punishment at a $100 fine and confinement for one year, probated for one year. The trial court later modified the terms of probation by extending the original term of probation until August 17, 1998. On August 10, 1998, the State filed a motion to revoke Verdeja's probation because he had not completed the required community supervision hours or a batterer's intervention program as directed by the probation order. Verdeja was arrested on September 8. On September 9, Verdeja's court-appointed attorney, Kimberly McCary, filed a motion to set bond, alleging that he could not comply with the terms of probation due to his injuries suffered in the Dallas County aggravated assault. She contacted Detective Joe Seaton of the Irving Police Department about the case and determined that he was willing to testify regarding the assault and Verdeja's inability to satisfy the terms and conditions of probation. McCary attended an informal hearing in the judge's chambers regarding the motion, but Seaton did not attend. Seaton told McCary that she would have to subpoena him to the hearing because he did not want to create the impression that he had provided a benefit to Verdeja by appearing in court and testifying on his behalf. McCary did not subpoena Seaton for the hearing. At the conclusion of the hearing, the court refused to set a bond. Consequently, McCary began to negotiate a resolution of the case with the prosecutor in charge of the case, Jonnie Cleveland. They did not immediately reach an agreement because Cleveland had to speak with her supervisor, Kerry Piel, about the case. Sometime shortly before October 2,1998, the Denton County District Attorney's Office contacted McCary and offered to reduce Verdeja's sentence to twenty-five days.

McCary knew this was a favorable offer since the common practice in Denton County was to reduce a sentence by no more than one-half. However, McCary believed the basis for the prosecutor's recommendation was that Verdeja could not successfully complete the terms of probation due to his injuries suffered in the assault. She had no knowledge of any facts which would have led her to believe that a deal had been made to obtain Verdeja's testimony. On October 2, Verdeja entered a plea of true in exchange for the State's recommendation to reduce the sentence to twenty-five days' confinement. The trial court initially questioned the recommendation out of a concern that Verdeja had not completed the batterer's program, but the judge ultimately accepted the plea.

Jonnie Cleveland recalled being involved in Verdeja's revocation case, but her supervisor, Kerry Piel, made the recommendation. She knew, however, that the basis for the recommendation was that Verdeja was the victim of a serious assault and they had alleged only technical violations of the probation order. She also stated they wanted to ensure that he would be available to testify in the Dallas County case. Their recommendation had nothing to do with any information provided by the Dallas County District Attorney's Office or the Irving Police Department.

In September and October of 1998, Kerry Piel was chief of the family violence section of the Denton County District Attorney's Office. Piel first became aware of Verdeja's motion to revoke when he received a call from an investigator in the Dallas County District Attorney's Office. Piel could not remember the investigator's name but the

person told him that Verdeja had been severely injured in an assault and was a witness in a major felony in Dallas County. The caller told Piel that the assault had set Verdeja back in his personal life and he asked whether Piel could look at the case and evaluate whether Verdeja could get a bond so that he could keep his job. Piel subsequently looked at the case and determined that nothing could be done about setting a bond. After speaking with Verdeja's probation officer, Piel made the offer to reduce his sentence so that he could enter a plea for what amounted to time served. Piel said that the caller never asked him to give consideration to Verdeja so that he could testify in the Dallas County cases but rather to consider that he had been the victim of a violent crime. He based his recommendation solely on the facts of the case and Verdeja's circumstances.

At the new trial hearing, Verdeja testified that he was completely unaware that Seaton or a member of the Dallas County District Attorney's Office had spoken to anyone about his revocation case and he never asked anyone to intercede on his behalf. His testimony in the Dallas County cases was not influenced by anything that happened in the Denton County case and he viewed them as separate matters. He had provided a statement to the Irving Police Department about the aggravated assaults prior to the filing of the motion to revoke and he had intended to testify regardless of what happened in the Denton County case.

Howard Blackmon, the prosecutor in Appellant's cases, testified that he was the person who had a brief telephone conversation with Piel about Verdeja's pending Denton County case. Blackmon called Denton County to

find out the status of Verdeja's case because he wanted to interview him in connection with the upcoming trial. For the same reason, he asked whether Verdeja would be able to bond out or whether he would be facing jail time. He asked Piel to call him after looking at the case but never heard from him. Blackmon recalled telling Piel about Verdeja's "hard luck story" but he did not do so with the intention of obtaining any benefit for Verdeja. Blackmon vehemently denied asking Piel to give any consideration to Verdeja because he viewed it as unnecessary since Verdeja was a victim in this case, he had been adamant in his desire to testify and tell the truth about the assault committed against him and his friends, and he would have been easier to find in jail. At the conclusion of the hearing, the trial court denied the motion for new trial.

Our review of this issue is informed by several well-founded rules of law. It is well established that great latitude should be allowed the accused in showing a witness's possible bias, prejudice, or motive to falsify his testimony. *Janecka v. State,* 739 S.W.2d 813, 830 (Tex.Crim.App. 1987). It is equally axiomatic that evidence of bias must be relevant in order to be admissible. *See id.* at 830. The due process clause of the Fourteenth Amendment to the United States Constitution imposes on a prosecutor an affirmative duty to turn over to the accused material, exculpatory evidence. *Brady. Maryland,* 373 U.S. 83,83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Ex parte Kimes,* 872 S.W.2d 700, 702 (Tex.Crim.App. 1993). Impeachment evidence is included within the scope of the term "exculpatory evidence." *US. v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985); *McFarland v. State,*

928 S.W..2d 482, 511 (Tex.Crim.App. 1996). Evidence is material if there is a reasonable probability that the outcome of the proceeding would have been different had the evidence been disclosed to the accused. *Bagley,* 473 U.S. at 682,105 S.Ct. at 3383; *Ex parte Kimes,* 872 S.W.2 dat 702. *Thus,* a due process violation occurs if. (1) the prosecutor fails to disclose evidence; (2) the evidence is favorable to the defendant; and (3) the evidence is material. *Ex parte Kimes,* 872 S.W.2d at 702; *Molinar v. State,* 910 S.W.2d 572, 582 (Tex.App. El Paso 1995, no pet.). However, a violation of the *Brady* rule does not occur where the prosecutor fails to disclose evidence that would have been inadmissible at trial. *Iness v. State,* 606 S.W.2d 306, 310 (Tex.Crim.App. 1980).

The granting or denying of a motion for new trial lies within the discretion of the trial court. *Lewis v. State,* 911 S.W.2d 1, 7 (Tex.Crim.App. 1995). We do not substitute our judgment for that of the trial court, but rather decide whether the trial court's decision was arbitrary or unreasonable. *Id.* Thus, we will reverse only when the trial judge's decision was so clearly wrong as to lie outside the zone of reasonable disagreement. *Cantu v. State,* 842 S.W. 2d 667, 682 (Tex.Crim.App. 1992), *cert. denied,* 509 U.S. 926, 113 S.Ct. 3046, 125 L.Ed.2d 731 (1993); *Montgomery v. State,* 810 S.W.2d 372, 380 (Tex.Crim.App. 1990).

The trial court's resolution of the credibility of the witnesses who testified at the motion for new trial hearing is critical to the issue before us on appeal. While Appellant argues that he should have been made aware that the prosecutors conferred a benefit on Verdeja, there is sub-

stantial proof in the record that the Dallas County prosecutor did not ask for any consideration for Verdeja in order to obtain his testimony and the Denton County prosecutors did not interpret the telephone call as requesting a *quid pro quo*. The Denton County prosecutor stridently maintained that he based his recommendation in the revocation case solely on the facts, including Verdeja's inability to comply with the terms and conditions of probation as a result of his injuries. Further, and perhaps most importantly, Verdeja did not ask for consideration and was, in fact, unaware that any telephone calls had been made by Seaton or Blackmon. The trial court apparently resolved the issues of credibility and conflicts in the evidence in favor of the State and we have no authority to set aside those implied findings in order to find a due process violation. For this reason alone, Appellant's contentions must fail. Furthermore, we are also persuaded by the State's argument that it had no obligation to disclose Blackmon's call to Piel because the evidence would not have been admissible at trial. Since there is no evidence that Verdeja had knowledge of the calls, he could not have believed that the Dallas County prosecutors had provided him with a benefit, and therefore, his testimony could not have been influenced by the reduction in his sentence. Stated differently, the evidence would have lacked relevance and would have been inadmissible to impeach him. *See Janecka,* 739 S.W.2d at 830-31 (given absence of evidence that cooperating witness was influenced by a plea bargain agreement between her husband and the State, trial court did not abuse its discretion in precluding cross examination on the terms of the plea bargain because the evidence lacked relevance on the issue of the witness's bias or possible bias). Consequently, there is no due process

violation for failure to disclose the irrelevant, and hence, inadmissible evidence. Points of Error Nos. One and Two are overruled.

Having overruled each point of error, the judgment of the trial court is affirmed.

February 15, 2001

/s/ Ann Crawford McClure
ANN CRAWFORD McCLURE, Justice

Before Panel No. 2
Barajas, C.J., McClure, and Chew, JJ.

(Do Not Publish)

APPENDIX B

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CANDELARIO HOLGUIN, JR.,	)	No. 08-99-00354-CR
Appellant,	)	08-99-00355-CR
	)	08-99-00356-CR
	)	Appeal from
	)	
V.	)	Criminal District
	)	Court No. 1
	)	
THE STATE OF TEXAS,	)	of Dallas County,
	)	Texas
Appellee.	)	(TC# F98-02888-KH)
	)	(TC# F98-02889-KH)
	)	(TC# F98-02890-KH)

JUDGMENT

The Court has considered this cause on the record and concludes there was no error in the judgment. We therefore affirm the judgment of the court below. We further order Appellant to pay all costs of this appeal, in accordance with the opinion of this Court, and that this decision be certified below for observance.

IT IS SO ORDERED THIS 15TH DAY OF FEBRUARY, 2001.

/s/ Ann C. McClure
Justice, Court of Appeals for
the Eighth District of Texas

Before Panel No. 2
Barajas, C.J.., McClure, and Chew, JJ.

APPENDIX C

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CANDELARIO HOLGUIN, JR., Appellant,	)	No. 08-99-00354-CR
	)	08-99-00355-CR
	)	08-99-00356-CR
	)	Appeal from
	)	
V.	)	Criminal District
	)	Court No. 1
	)	
THE STATE OF TEXAS,	)	of Dallas County,
	)	Texas
Appellee.	)	(TC# F98-02888-KH)
	)	(TC# F98-02889-KH)
	)	(TC# F98-02890-KH)

ORDER

The Appellant's motion for rehearing, having been duly considered, is overruled. Accordingly, it is ORDERED that said motion be and it is hereby overruled.

IT IS SO ORDERED THIS 28TH DAY OF MARCH, 2001.

/s/ Ann C. McClure
ANN CRAWFORD McCLURE, Justice

En banc
Barajas, C.J., Larsen, McClure, and Chew, JJ.

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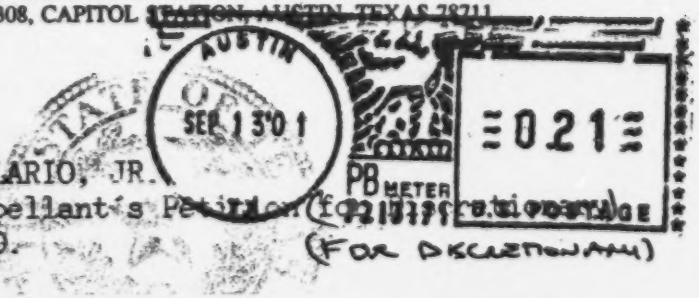
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711



September 12, 2001
COA#: 08-99-00355-CR
RE: Case No. 0813-01
STYLE: HOLGUIN, CANDELARIO, JR.

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

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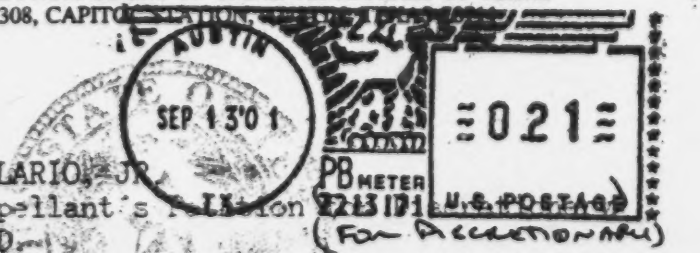

September 12, 2001
COA#: 08-99-00354-CR
RE: Case No. 0812-01
STYLE: HOLGUIN, CANDELARIO, JR.

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
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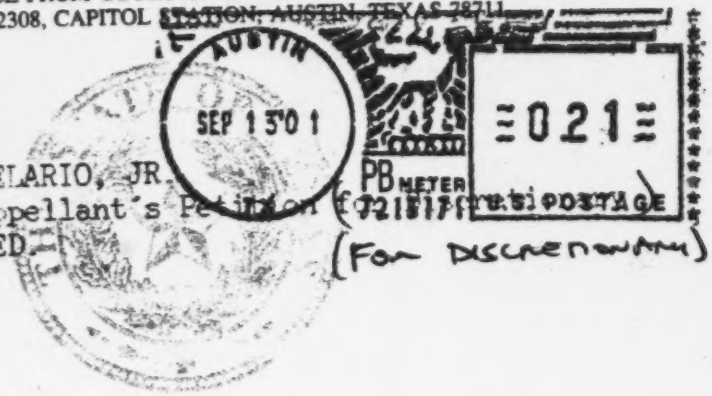

September 12, 2001
COA#: 08-99-00356-CR
RE: Case No. 0814-01
STYLE: HOLGUIN, CANDELARIO, JR.

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Mary C. Bennett, Jr., Clerk

WILLIAM A BRATTON III
2828 ROUTH STREET
SUITE 850 LOCK BOX 10
DALLAS TX 75201

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APPENDIX E

Filed Feb 26, 1999

CAUSE NO. F98-02888-FH
F98-02889-FH
F98-02890-FH

STATE OF TEXAS	§	IN THE CRIMINAL
	§	
VS.	§	DISTRICT COURT
	§	
CANDELARIO HOLGUIN	§	DALLAS COUNTY, TEXAS

MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes CANDELARIO HOLGUIN, Defendant in the above entitled and numbered cause, by and through his attorney of record, WILLIAM A. BRATTON, III, under the authority of **TEX. R. APP. PROC. 21 and Article 1, Section 10 of the Constitution of the State of Texas, and the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States of America,** and makes this Motion for New Trial moving the court to grant a new trial in each of the above entitled and numbered causes. In support thereof, the Defendant would respectfully show the as follows:

I.

The verdict is contrary to the law and the evidence.

II.

That the Defendant filed on January 6, 1999, a Motion for Discovery and a Motion for the Production and Inspection of Evidence and Information Which May Lead to Evidence each of the above entitled and numbered causes. In paragraph II (F) of the Motion for Discovery, the Defendant requested the criminal record of any witness the State called to the stand prior to the testimony of that witness. In paragraph II (I), of the Motion for Discovery, the Defendant requested any and all considerations or promises of consideration given to or on behalf of a witness or expected or hoped for by the witness. The Defendant defined "consideration" as absolutely anything, whether bargained for or not, which arguably could be of value or use to a witness or to persons of concern to the witness. The trial court granted each of the Defendant's requests. As to paragraph II (I) the State specifically stated that there were no deals with any witness. As to the Motion for the Production and Inspection of Evidence and Information Which May Lead to Evidence, the State informed the court that it had no exculpatory evidence in its possession.

III.

That Paul Verdeja was called as the third witness by the State in its case-in-chief. Paul Verdeja was the only State's witness who identified the Defendant, Candelario Holguin, as being present at the scene of the assault on May 30, 1998. At the time of Mr. Verdeja's testimony, the defense was advised that there were no impeachable prior criminal convictions of Mr. Verdeja and, as previously

stated, no deals with Mr. Verdeja.

IV.

The Defendant has discovered since sentencing in the above entitled and numbered causes, that Paul Verdeja had a pending assault probation at the time of the alleged offense on May 30, 1998. This assault was styled the State of Texas vs. Paul Ramos Verdeja, III, cause no. 96-08173-D pending in the County Criminal Court No. 1 of Denton County, Texas. (see attached exhibit "A") Further, it was discovered that Paul Verdeja was arrested on September 8, 1998 based upon a Motion to Revoke Probation filed on or about August 10, 1998. (see exhibit "B") By motion filed September 9, 1998, the attorney representing Mr. Verdeja, the Hon. Kimberly Cawley McCary, moved to reduce the bond set on W. Verdeja and alleged that investigator Joe Seaton was willing to testify before the court regarding Mr. Verdeja's situation and inability to satisfy the terms of his probation. (see attached exhibit "C")

V.

At the bond reduction hearing conducted on September 9, 1998, Joe Seaton did not appear. However, Joe Seaton and a Dallas County Probation Officer contacted the prosecutor, Johnnie Cleveland, regarding the ultimate resolution of the case. Through no action on the part of Paul Verdeja's attorney, Ms. McCary, the recommendation on revocation was reduced from 365 days to 25 days. (see attached exhibit "D") At the time the plea was taken, the judge questioned the recommendation of the district

attorney which was based solely on considerations made to Mr. Verdeja through the request of Joe Seaton based upon Mr. Verdeja's participation in the instant cause.

VI.

That the withholding of the specifically requested information, as well as any mention of the cause which was pending against Mr. Verdeja in Denton County, Texas which could be used both through impeachment and motive or bias in his testimony. The evidence was withheld by the prosecution, the evidence was favorable to the Defendant, and was material to the defense. Flores v. State 940 S.W. 2d 189 (Tex. Ct. App. - San Antonio 1996); Thomas v. State 841 S.W. 2d 399 (Tex. Crim. App. 1992); Ex Parte Kimes 872 S.W. 2d 700 (Tex. Crim. App. 1993).

WHEREFORE, PREMISES CONSIDERED, the defendant prays that this Motion be in all things granted.

Respectfully submitted,

/s/ W. A. Bratton, III

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(214) 871-0620 (fax)
State Bar No. 02916300
ATTORNEY FOR DEFENDANT

APPENDIX F

Filed Apr 6, 1999

CAUSE NO. F98-02888-FH
F98-02889-FH
F98-02890-FH

STATE OF TEXAS	§	IN THE CRIMINAL
	§	
VS.	§	DISTRICT COURT
	§	
CANDELARIO HOLGUIN	§	DALLAS COUNTY, TEXAS

ORDER

On the 6 day of April, 1999, the foregoing Motion for New Trial came on for hearing and the same is in all things, DENIED).

SIGNED this the 6 day of April, 1999.

/s/ Janice Warden
JUDGE PRESIDING